BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

JAMES RIVER II, INC., et. al.,	)	
	)	**PCHB NOS. 91-140,**
Appellants,	)	**143, 146, 147**
	)	**148, 150, 151**
v.	)	**154, 169, 182, 186**
	)	
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)	
	)	
Respondent.	)	**FINAL JUDGMENT**
	)	**AND ORDER**
v.	)	
	)	
PUGET SOUND ALLIANCE, et. al.,	)	
	)	
Appellant-Intervenors.	)	
	)	

A. STAYS During the course of these proceedings the following stays were ordered

1 Findings, Conclusions and Order Denying Stay of Fecal Coliform Limits, entered January 30, 1992

2 Findings, Conclusions and Order Granting and Denying Mills' Motions for Stays, entered April 15, 1992

These are now superseded by this Final Judgment and Order.

B. SUMMARY JUDGMENTS The following summary judgments were ordered·

1 Partial Summary Judgment, entered April 2, 1992, (Judgment for Ecology on process of modifying ITT Rayonier's Port Angeles Division permit)

2. Partial Summary Judgment, entered April 2, 1992, (Reverse AOX limits; monitoring affirmed)

3. Partial Summary Judgment, entered May 15, 1992, (Reverse dioxin, affirm SEPA)

Final judgment is granted on these

C. **ORDER ON ISSUES** Upon motion, an Order on Issues was entered on January 22, 1993. Final judgment is granted on that order.

D. **JOINT STATEMENT OF ISSUES REMAINING FOR TRIAL**. The parties having jointly stated on February 3, 1993, that no issues remain for trial,

WHEREFORE the Board now enters the following

ORDER

1 The organochlorine control programs (AOX and dioxin) of these permits are each reversed and remanded to Ecology An exception is granted for monitoring provisions cited in our prior orders, which are affirmed.

2 The balance of the permits are affirmed.

DONE at Lacey, WA, this 10th day of February, 1993

William A. Harrison

HONORABLE WILLIAM A HARRISON
Administrative Appeals Judge

POLLUTION CONTROL HEARINGS BOARD

Harold S. Zimmerman

HAROLD S ZIMMERMAN, Chairman

Annette S. McGee

ANNETTE S. McGEE, Member

Robert V Jensen

ROBERT V JENSEN, Attorney Member

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JAMES RIVER II, INC., et. al.,	)	
	)	**PCHB NOS. 91-140,**
Appellants,	)	**143, 146, 147**
	)	**148, 150, 151**
v.	)	**154, 169 and 182**
	)	
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)	
	)	**PARTIAL**
Respondent,	)	**SUMMARY JUDGMENT**
	)	
v.	)	
	)	
PUGET SOUND ALLIANCE, et. al.,	)	
	)	
Appellant-Intervenor.	)	
	)	

Pursuant to the Scheduling Order entered April 2, 1992, dispositive pretrial motions were filed and briefed by the parties. The oral argument of counsel was heard on April 24, 1992. The following written record was considered in the disposition of these motions:

MOTIONS

1. ITT Rayonier's Motion for Partial Summary Judgment on Intervenor's SEPA claims.

2. ITT Rayonier's Motion for Partial Summary Judgment on Appellants' SEPA claims.

3. Appellants' Motion for Partial Summary Judgment on Intervenor's SEPA claims.

4. Appellants' Motion for Partial Summary Judgment on the NPDES Dioxin Control Programs.

5. Ecology's Motion for Partial Summary Judgment Against Columbia River Mills on Dioxin Limits.

6. Appellants/Intervenors' Motion for Summary Judgment.

RESPONSE

1. Columbia River Mills' Opposition to Motion to Dismiss and Longview Fibre's Response to Cru et. al.'s Motion for Summary Judgment.

2. Boise Cascade's Memorandum in Opposition to Intervenor's Motion for Summary Judgment with Declarations of Dennis Ross and Erick M. Tokar.

3. Dioxin/Organchlorine Center, Columbia River United, Inc., and Puget Sound Alliance's Memorandum in Opposition to Appellants' Motion for Partial Summary Judgment on the NPDES Dioxin Control Programs and Appellant/Intervenors' Memo in Opposition to Appellants' Motion for Partial Summary Judgment on Intervenor's SEPA claims.

4. Ecology's filings:

   a. Response to Mills' Motion for Partial Summary Judgment on NPDES Dioxin Control Programs.

   b. Memorandum in Opposition to Intervenor's Motion for Summary Judgment.

   c. Declaration of Richard A. Burkhalter

5. Weyerhaeuser's Declaration of Kenneth V. Johnson.

6. Scott Paper's Memorandum in Opposition to Intervenor's Motion for Summary Judgment with Affidavit of Scott Isaacson and Exhibits A, B and C.

7. Declarations of Fred Fenske, Carol A. Whitaker, Dennis Ross and Edwin H. Dahlgren.

REPLIES

1. Mill's Reply in Support of Summary Judgment on the Dioxin Control Program.

2. Ecology's Reply to the Columbia River Mills' Opposition to Motion for Partial Summary Judgment.

3. Ecology's corrections to affidavit of Allen Miller.

4. Reply Memorandum in Support of Appellants' Motion for Summary Judgment on Intervenors' SEPA Claims.

5. Boise Cascade's Memorandum in Support of Appellants' Motion for Summary Judgment on Dioxin Control Programs.

6. Declarations of Donald C. Malins, Thomas P. Hubbard and Mark J. Floegel in Support of Appellant/Intervenors' Motion for Summary Judgment.

7. Reply Memorandum of James River in Support of Summary Judgment on the Dioxin Control Program.

8. ITT Rayonier's Reply Memorandum in Support of Motion for Partial Summary Judgment on the NPDES Dioxin Control Programs.

9. Reply Memorandum of Weyerhaeuser Company in Support of Summary Judgment on the Dioxin Control Program.

10. Intervenors/Respondents Reply Memorandum in Support of Motion for Summary Judgment with Reply Declaration of Thomas P. Hubbard.

Having considered the motions, briefs, affidavits and related papers, having heard the oral argument of counsel and being fully advised, we conclude as follows:

I

JURISDICTION

In May, 1991, the Washington State Department of Ecology ("Ecology") began issuing waste discharge permits to ten pulp and paper mills in the State of Washington. Those mills

have filed appeals challenging the dioxin control and other provisions of these permits. Under RCW 43.21B.110(1)(c), we have jurisdiction to review the issuance of the permits.

Our review measures compliance of the permits with state law. In this case, state law refers directly to the U.S. Clean Water Act, 33 U.S.C. 466, et seq.:

> The department of ecology is hereby designated as the State Pollution Control Agency for all purposes of the federal clean water act as it exists on February 4, 1987, and is hereby authorized to participate fully in the programs of the act as well as to take all actions necessary to secure to the state the benefits, and to meet the requirements of that act. RCW 90.48.260.

We therefore review the permits issued by Ecology for compliance with the U.S. Clean Water Act. See also, Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1434 (9th Cir. 1991) and Roll Coater, Inc. v. Reilly, 932 F.2d 668, 671 (7th Cir. 1991).

Finally, our review also encompasses compliance with the State Environmental Policy Act, Chapter 43.21C RCW. Asarco v. Air Quality Coalition, 92 Wn.2d 685, 601 P.2d 501 (1979).

II

THE MILLS' MOTION FOR SUMMARY JUDGMENT UNDER SECTION 304(L) OF THE U.S. CLEAN WATER ACT

A. Section 304(l)

On February 4, 1987, Congress amended the U.S. Clean Water Act by adding the following as Section 304(l):

> (l) Individual control strategies for toxic pollutants
> (1) State list of navigable waters and development of strategies
>
> Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection--

(A) a list of those waters within the State which after the application of effluent limitations required under section 1311(b)(2) of this title cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 1313(c)(2)(B) of this title, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;

(B) a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 1317(a) of this title;

(C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source; and

(D) for each such segment, an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 1342 of this title and water quality standards under section 1313(c)(2)(B) of this title, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy. 33 U.S.C. § 1314(l).

B. Necessity of a Numeric Water Quality Standard for Dioxin

The mills urge that Ecology cannot impose a dioxin control program under Section 304(l) in the absence of a numeric water quality standard for dioxin. We agree.

On the same date that Section 304(l) was added, Congress likewise amended the Clean Water Act as follows:

(B) Whenever a State reviews water quality standards . . . such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title,

> the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants.
> Section 303(c)(2)(B) codified as Section 1313(c)(2)(B). (Emphasis added.)

This language is unequivocal in calling for a numeric, rather than narrative, water quality standard. It applies to dioxin, a Section 307 (codified as Section 1317) toxic pollutant.

Each state is required to review their water quality standards at least once each three year period. See CWA Section 303(c)(1). While this record does not disclose the actual timing of review by Washington State, the last date for adoption of a numeric water quality standard for dioxin under Section 303(c)(2)(B) would be three years after that section was enacted, or February 4, 1990. Washington State has not, either before or after that date, adopted a numeric water quality standard for dioxin. Ecology has taken the position that such a numeric standard should be adopted by the U.S. Environmental Protection Agency (EPA). Ecology's Response, page 7 at note 1. The EPA has proposed numeric water quality standards for toxics for Washington State. Federal Register, November 19, 1991. The EPA has not adopted a numeric water quality standard for dioxin for Washington State. The target for doing so was February 19, 1992. Permit Program Review at II.C.6, Exhibit A to Ecology's Memorandum in Opposition to Intervenors' Motion for Summary Judgment. Thus neither Ecology nor EPA have adopted a numeric water quality standard for dioxin for Washington State despite the requirements of Section 303(c)(2)(B).

We turn now to Section 304(l). (Text at A, above). The section has, at paragraph 1, four sub-paragraphs indentified as A, B, C and D. Under A and B, states must list for EPA certain waters expected to show sub-standard water quality. Under C, states must list point sources which are impairing water quality by the discharge of toxic pollutants. Finally, under D, the states must prescribe corrective action in the form of an "individual control strategy."

The language employed by Congress is not uniform throughout A, B, C and D. The U.S. Court of Appeals (Ninth Cir.) has observed this in NRDC v. EPA, 915 F.2d 1314, (9th Cir. 1990) at note 5:

> The reason that some waters on the B list may not be on the A(i) list is that paragraph A(i) refers to section 303(c)(2)(B), which in turn refers only to waters whose water quality standards have been reviewed since the passage of the 1987 amendments, whereas paragraph B refers to all water quality standards, even if adopted before the 1987 amendments.

The B list referred to in the Court's note refers to "applicable standard" and does not specifiy a numeric standard. By contrast, the A(i) list refers to "section 1313(c)(2)(B)" which does specifiy a numeric standard. In this case, Ecology urges that the B list of waters may be drawn up with reference to its narrative, rather than numeric, water quality standard. On this point, we agree. Yet nothing would suggest the same for the A(i) list which is to be drawn by specific reference to a numeric standard.

Moreover, the D language governing individual control strategies, also refers to "section 1313(c)(2)(B)" which specifies a numeric standard. The individual control strategies under D must be devised through the establishment of numeric water quality standards. To conclude otherwise would be to render superfluous the reference in D to section 1313(c)(2)(B) A statute is to be interpreted so that no one section is rendered inoperative, superfluous or meaningless. See, PUD 1 v. Public Employment Relations Comm'n, 110 Wn.2d 114, 118, 750 P.2d 1240 (1988). See 2A Sutherland Statutory Construction § 46.06 (4th ed. 1984).

We are aware of a comment by EPA at 54 Fed. Reg. 23881-2 which states:

> The section 304(l) statutory language mandates that states and EPA move forward expeditiously to achieve water quality goals and it does not provide relief from deadlines due to lack of numeric criteria within state water quality standards.

This is a comment which appears in the context of the B list where we have held that numeric standards are not specified. The sweep of the comment, removed from its context, may suggest that all of section 304(l) is free of the need for a numeric standard. To this extent, it is in conflict with the unambiguous language of section 304(l)(1)(D) relating to individual control strategies by establishment of a numeric water quality standard under section 303(c)(2)(B). The intent of Congress is clear and that is the end of the matter. See, Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843, 104 S. Ct. 2778, 2781, 81 L. Ed.2d 694 (1984) as cited in NRDC v. EPA, supra, at 1320.[1]

Finally, Ecology urges that the deadlines in Section 304(l) for issuance and compliance with individual control strategies must take precedence whether or not government has adopted the numeric standard required by D to underlie those strategies. We disagree. Ecology points out that section 304(l) sets a deadline of February 4, 1989, for filing the lists of water, point sources and individual control strategies. It then correctly points out that given the three year review of water quality standards, certain states may not be obliged to adopt numeric standards under section 303(c)(2)(B) until February 4, 1990. Even so, we cannot read out of the Act, the section 304(l)(1)(D) requirement for numeric standards. There are three observations to be made about Ecology's "1989 deadline" argument. First, it must be limited to those situations where there are numeric standards by the 1989 deadline so far as individual control strategies.

[1] Ecology urges that:

Of course the Pollution Control Hearings Board has no power to invalidate federal regulations. So long as the state chooses to continue to implement the Clean Water Act, both Ecology and the Board are bound to follow regulations of the U.S. Environmental Protection Agency pertaining to the Act. Ecology's Response, p. 6, lines 15-20.

The EPA statement, above, at 54 Fed. Reg 23881-2 is a comment and not a regulation. Assuming, for the sake of argument that it were a regulation it would be no less in conflict with the Clean Water Act. As stated at I, supra, on Jurisdiction, we review state permits under RCW 90.48 260 for compliance with the U.S. Clean Water Act. When EPA regulations and the Clean Water Act part company, permits must follow the Act. Our review will be toward that end.

This is the consequence of reading the deadline together with the reference to section 303(c)(2)(B) in section 304(l)(1)(D). Second, the 1989 deadline was mooted by the facts of this case showing that Ecology - EPA agreement over individual control strategies occurred on June 4, 1990 and permits containing those strategies were issued in May, 1991. Both dates are subsequent to the deadline of sections 303(c)(1) and 303(c)(2)(B) for numeric standards no later than three years after the 1987 CWA amendments, or February 4, 1990. As this is written in 1992, there is yet no numeric water quality standard in Washington State for dioxin. Thirdly:

> " . . . private discharges cannot properly be forced to bear the significant adverse consequences of delays and shortcomings chargeable solely to the government."

ITT Rayonier Incorporated v. Department of Ecology, 91 Wn.2d 682, 693-694, 586 P.2d 1155, 1161 (1978) citing therein Republic Steel Corp. v. Train, 557 F.2d 91 (6th Cir. 1977) and State of Washington v. EPA, 573 F.2d 583 (9th Cir. 1978).

In summary, we hold that the dioxin control program in the permits issued to the mills was not devised through the establishment of numeric water quality standards for dioxin, and so cannot find support in Section 304(l) of the U.S. Clean Water Act. Summary judgment is granted for the mills on this point. The relief requested by the mills at this juncture is that the dioxin control programs be stricken from each of the permits at issue. In support of their request for relief, the mills cite Securities and Exchange Comm'n v. Chenery Corp., 67 S. Ct. 1575, 1577 (1947) for the proposition that:

> " . . . a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action soley by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."

That case and the others cited by the mills for the same proposition are distinguishable from this case. In Securities and Exchange Comm'n, supra, there was an administrative disapproval of a corporate reorganization. Nothing in the opinion suggests that the judicial review was conducted on a de novo basis. Here, by contrast, both the standard and scope of review are de novo. WAC 371-08-183. See also San Juan County v. Department of Natural Resources, 28 Wn. App. 796, 626 P.2d 995 (1981) construing the parallel rule of the Shorelines Hearings Board. This distinguishes, also, the cases of American Meat Inst. v. EPA, 526 F.2d 442, 453 (D.C. Cir. 1975) and Somers v. Woodhouse, 28 Wash. App. 262, 623 P.2d 1164, 1171 (1981) cited by the mills. Under de novo review Ecology may assert within these proceedings a different basis for its actions than asserted previously. It must do so upon adequate notice to allow preparation by opposing parties. Opponents to Ecology's actions are similarly entitled to assert a different basis for opposition in these proceedings than may have been asserted previously. The result is to hear and decide all tenable theories of a case within a single proceeding.

Because we conclude that Ecology is not barred from raising other grounds, aside from section 304(l), in support of its permits, we decline to strike the dioxin control programs from the permits until Ecology is afforded the opportunity to present such other grounds. In this regard we note the specific reference in the Ecology brief that:

> Ecology could have taken the same action pursuant to section 303(d) without following the procedural steps of listing the mills first. Ecology Response at p. 19, lines 16-18.[2]

[2] Intervenors, Puget Sound Alliance (PSA) and others also assert the Washington State "AKART" standard of RCW 90.48.520 We see nothing on the record in this matter to date which suggests that Ecology relied upon that standard nor applied its terms in reaching the dioxin control programs in these contested permits

Within a reasonable time to be set by further order, Ecology may elect to present other grounds in support of the dioxin control programs of its permits. In the event Ecology elects not to present such other grounds, the mills' request for relief should then be granted and the dioxon control programs should then be stricken.

C. Necessity of Best Available Technology Standards for Dioxin

Section 304(l)(1)(B) of the Clean Water Act requires listing waters "for which the state does not expect the applicable standard . . . will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met. . . "

The requirements of section 1311(b) (section 301(b)) are the relevant technology-based standards for the mills, not sections 1316 and 1317(b). Section 301(b)(2)(A) provides for the achievement of effluent limitations based upon the best available technology (BAT). Moreover, Section 301(b)(2)(C) and (D) provide for the achievement of BAT effluent limitations for toxics "in no case later than March 31, 1989." Yet, there are no effluent limitations guidelines for dioxin or corresponding permit limits. (Ecology Response, p. 12, lines 7-8). The EPA is developing effluent limitations for dioxin with proposed regulations expected in 1993, and final regulations expected in 1995. Final Report, Proposed Effluent Limitations for Dioxin and AOX, Tab B to Appellants Motion for Summary Judgment on AOX.

In light of the substantial gap between section 301(b)'s 1989 date for compliance with BAT effluent limitations for toxics and the futuristic and tentative schedule to adopt those limitations, what does section 304(l) mean when it refers to " . . . after the requirements of section 301(b) . . . are met . . . ?" Do "requirements" refer to what might have been had BAT effluent limitations for dioxin been adopted prior to the compliance deadline of 1989? Or do "requirements" refer to the reality where neither by the 1989 deadline, nor thereafter, have

governmental requirements included BAT effluent limitations for dioxin? We conclude that section 304(l)'s reference to the "requirements" of section 301(b) is ambiguous.

In the preamble to its section 304(l) regulations, EPA expressed this comment:

> Some commentators asked EPA how to assess whether to list waters on the paragraph (B) list which have point sources which do not yet meet either existing permit limits derived from technology-based standards under section 301(b), 306 and 307(b) of the CWA, or do not yet have such permit limits. EPA requires the state to list any water that was not meeting its applicable water quality standards by February 4, 1989, on one or more of the lists of waters described above, as appropriate.
>
> The only exception to this requirement is provided when a state demonstrates that enforceable permit limits derived from technology-based standards will bring the water into compliance with applicable water quality standards. However, EPA expects that where compliance with technology-based limits cannot be expected within three years of the preparation of the list, there will be too much uncertainty in the determination of whether the limits are adequate to achieve water quality standards in order to demonstrate to EPA that the water should not be listed. 54 Fed. Reg. 23881 (1989).

On the date that section 304(l)(1)(B) lists were due, February 4, 1989, there were no technology-based limits for dioxin. The EPA comment therefore construes section 304(l) lists to be drawn up according to the technology-based requirements actually in existence when the lists are filed. It does not turn upon technology-based requirements which failed to come into existence at that time, such as any relating to dioxin. We conclude that this is a permissible construction of the ambiguous term "requirements" in section 304(l). See Chevron U.S.A. as cited in NRDC v. EPA, supra.

In reaching this conclusion, we have carefully considered the legislative history cited by the mills on this issue. While there are several references to water quality pollution control being "beyond BAT" we note that there are technology-based effluent limitations which the mills concede to be "BAT limitations," though not applicable to dioxin. Appellants' Motion,

pp. 16-17. In none of the legislative history have we seen a statement that section 304(l) water quality based regulation may not proceed until that time, however distant, that there is a BAT limitation specific to the pollutant to be regulated under section 304(l). In that regard, the legislative history is in harmony with EPA's construction of section 304(l) in focusing on existing BAT limitations at the time the lists are due, not BAT limitations to be derived in the future.

In summary, we hold that the water quality-based regulation of dioxin under section 304(l) is consistent with that section notwithstanding the lack of best available technology standards for dioxin. Summary judgment may be granted to the non-moving party where entitlement is shown. Orland, Wash. Rules Practice §5656 and cases cited therein. That is the case here. Summary judgment is granted for Ecology that BAT standards for dioxin are not necessary to proceed under section 304(l).

D. Necessity to Determine the Amount of Dioxin Discharged by Each Mill

Under section 304(l)(1)(B), a state must list waters where quality standards won't be met "due entirely or substantially to discharges from point sources of any toxic pollutant." Once those waters are indentified, the state must determine "specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each source." Section 304(l)(1)(C).

Eight of the ten appealing mills urge that Ecology has not determined the amount of dioxin discharged and that regulation under section 304(l) is therefore inappropriate. We disagree.

First, the B list of waters covers those situations where "one or more" point source is sufficient to cause or is expected to cause an excursion above the applicable water quality standard . . . " 40 CFR §130.10(d)(5)(ii). Ecology relies upon the 104- mill study and other

data to conclude that six of the eight mills have dioxin concentrations in their discharge which exceed the concentrations necessary to meet water quality standards. Since the two mills for which there is no discharge data are on the same water body as one which shows exceedence, "one or more" point sources is responsible and all must be listed. Ecology follows this with an affidavit showing that the two mills are in fact discharging dioxin in excess of permit limits. Affidavit of Chung Ki Yee dated October 15, 1991.

Next, this evidence supports listing of the eight mills on the C list as they are "believed to be preventing or impairing such water quality." While Ecology concedes that it probably did not know the exact amount of dioxin discharged by the two mills for which dioxin concentrations in the effluent were not available it did have evidence that all eight mills are discharging dioxin in excess of the permit limits which it deemed necessary to meet water quality standards. This is a sufficient determination of the "amount" of each mill's discharge to justify listing the mills under section 304(l)(1)(C) as a matter of law. Later, at trial, the propriety of the listing may be placed at issue by factual dispute of the amount of discharge.

In summary, we conclude that Ecology had legally sufficient evidence as to the amount of dioxin discharged to list the mills under section 304(l)(1)(C) in the first instance. Summary judgment is granted to Ecology on this point.

III

ECOLOGY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST COLUMBIA RIVER MILLS ON DIOXIN LIMITS

On February 25, 1991, EPA issued a "Total Maximum Daily Load" (TMDL) to limit discharges of dioxin to the Columbia River. Such a TMDL results in waste load allocations (WLA's) to each point source for dioxin. In turn, Ecology has issued permits to the mills with effluent limitations which it deems consistent with the WLA's and TMDL.

The TMDL adopted by EPA was done by reference to water quality standards adopted by Washington, Idaho and Oregon, the three states bordering the Columbia River and its major tributaries. Washington and Idaho have narrative water quality standards, while Oregon has a numeric standard of .013 ppq. EPA has interpreted all three states' standards as being equally stringent. TMDL Decision Document, February 25, 1991, attached to affidavit of Chung Ki Yee, Ph. D. at A-2. In a footnote to that interpretation, EPA recognized the decision of the Superior Court of Washington for Thurston County which cast doubt upon the validity of EPA's interpretation. EPA then went on to conclude:

> EPA believes that this decision does not affect the use of 0.013 ppq as the water quality standard for dioxin in developing this TMDL because all waste load allocations and permit limits must ensure compliance with applicable water quality standards of downstream states [40 CFR §122.4(d)]. Oregon's water quality standard is clearly stated as being 0.013 ppq for 2, 7, 7, 8-TCDD. TMDL Decision Document, supra, at A-2, F.N. 1.

From this Ecology urges that:

> " . . . the pulp and paper mills, as a matter of law, are precluded from challenging the TMDL before the Pollution Control Hearings Board, which has no authority to overturn federal actions. Furthermore, the federal TMDL is based upon a water quality standard which has been adopted by the State of Oregon." Memorandum of Law in Support of Ecology's Motion, p. 2, lines 5-12.

We disagree. First, the items at issue here are state issued NPDES permits. We have jurisdiction to review these. See paragraph I., supra. The portions of the permits at issue are dioxin effluent limitations which are intended to be in alignment with a TMDL which itself is supported by the water quality standards of all three Columbia River states, including Washington State. The meaning of that water quality standard is a matter for state tribunals. See EPA Brief to the U.S. Court of Appeals. (9th Cir.), Exhibit B to the Mills' Opposition.

A challenge to Washington's water quality standard is pending here. Should the challenge result in revision of the dioxin criteria, EPA must modify the TMDL in order to adhere to its assertion that it is based upon water quality standards for all three Columbia River states.

Second, if EPA shifts its ground, as in F. N. 1 quoted above, to base its TMDL on compliance with Oregon's water quality standard to ensure compliance with the standards of downstream states, the necessity of limiting Washington mills to an Oregon standard must be shown to be factually necessary to that end. See Arkansas v. Oklahoma, 60 U.S. L.W. at 4181.

Finally, even were the result of this case to sustain the meaning of the Washington water quality standard as Ecology presents it, Ecology has certain discretion to determine the actual dioxin effluent limits. The approach taken by Ecology is contested by the mills which cite a Technical Support Document for Water Quality Based Toxics Control published by EPA. Exhibit C referred to at p. 14 of Mills' Opposition. There are genuine issues of material fact concerning Ecology's exercise of its discretion.

In summary, the adoption of a federal TMDL does not divest us of jurisdiction to review these permits nor their dioxin limitations. Summary judgment on this motion is denied.

IV

CROSS MOTIONS FOR SUMMARY JUDGMENT UNDER THE STATE ENVIRONMENTAL POLICY ACT

The Puget Sound Alliance (PSA) and others move for summary judgment on the grounds that Ecology issued the subject permits without compliance with the State Environmental Policy Act (SEPA), chapter 43.21C RCW. The mills move for summary

judgment on grounds that Ecology issued the permits in full compliance with SEPA and its attendant regulatory exemption, WAC 197-11-855(1), relating to waste discharge permits.

At the outset we declare unequivocally our jurisdiction, in an adjudicative proceeding, to review and interpret the provisions of statutes and the accompanying regulations for consistency. Since all our adjudicative proceedings involve the review of permits, penalties or other orders directed at specific persons, such items must be consistent with both statute and regulations in order to be sustained. As we observed earlier in this order, should a regulation part company with a statute, the permit (or penalty or order) must follow the statute. Our holding in this regard stands upon the precedent of cases in which we have previously reviewed permits or penalties imposed under regulations challenged as inconsistent with statutes. Asarco, Inc. v. Puget Sound Air Pollution Control Agency, 112 Wn.2d 314 (1989), Kaiser Aluminum v. Pollution Control Hearings Board, 33 Wn. App. 352 (1982), Chemithon Corp. v. Puget Sound Air Pollution Control Agency, 31 Wn. App. 276 (1982), Puget Sound Air Pollution Control Agency v. Kaiser Aluminum, 25 Wn. App. 273 (1980), Frame Factory v. Department of Ecology, 21 Wn. App. 50 (1978), Simpson Timber Company v. Olympic Air Pollution Control Authority, 87 Wn.2d 35 (1976), and Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310 (1976).

In the specific area of comparing SEPA and its regulatory exemptions, our assertion of jurisdiction is consistent with the recent Order of Dismissal granted by the Thurston County Superior Court in No. 91-2-01838-1, effectively leaving that issue to adjudication here. Finally, we distinguish Weyerhaeuser Co. v. DOE, PCHB No. 85-220 (1986) wherein we stated with regard to the SEPA exemption at issue:

> We do not choose to look behind the exemption in this case. (Emphasis added) Conclusion of Law XIII, p. 27

That Conclusion turned upon the pleadings and evidence in that case and was not a repudiation of jurisdiction. Where, as here, the pleadings and motion papers clearly invoke our jurisdiction to examine a permit in light of SEPA and its attendant exemption, we will exercise that authority.

Turning to the merits, we set forth the guiding principles of our review. Where the Legislature has specifically delegated rule-making power to an agency, the regulations are presumed valid, and the party asserting invalidity bears the burden of proof. Multicare Medical Ctr. v. DSHS, 114 Wn.2d 572, 588 (1990) and Weyehaeuser v. Ecology, supra. Moreover, the challenged regulation need only be "reasonably consistent" with the statute it implements to be upheld. Id.

In this case, Ecology has been specifically delegated the rule-making power under SEPA. RCW 43.21C.110. It is authorized by -.110 to adopt rules specifying:

> 1) Categories of governmental actions which are not to be considered as potential major actions significantly affecting the quality of the environment, including . . . The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly . . . (Emphasis added.)

While the mills point out that the above language was amended somewhat following the decisions in Downtown Seattle Planning Committee v. Royer, 26 Wn. App. 156 (1980) and Noel v. Cole, 98 Wn.2d 375 (1982), we are not persuaded that those amendments varied the holdings of those cases. The crux of those cases and RCW 43.21C.110 quoted above is that a "major action significantly affecting the quality of the environment" cannot, by regulation or otherwise, be exempt from SEPA. Downtown, supra at 165. Noel, supra, at 380-381.

Here, Ecology has adopted a SEPA categorical exemption which provides:

> (1) The issuance, reissuance or modification of any waste discharge permit that contains conditions no less stringent than federal effluent limitations and state rules and regulations. This exemption shall apply to existing discharges only and shall not apply to any new source discharges. WAC 197-11-855.

Of course, Ecology is also the agency responsible for the issuance or reissuance of the waste discharge permits in question. As such it implements both state and federal law. RCW 90.48.260. Under the pertinent federal law, U.S. Clean Water Act, sec. 511 (c)(1), 33 U.S.C. §1371(c)(1). Congress specifically provided that the issuance of NPDES permits, except permits issued to new sources, is not "a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act [NEPA]". This is a statutory NEPA exemption. Moreover, for the reasons which follow, we conclude that it is also a statutory SEPA exemption.

First, we see no material distinction created by the sec. 511(c)(1) references to "federal" action or "human" environment. The permit issuance here is no more or less environmentally significant because it is a state rather than federal action. Nor does the "human" environment differ from the general environment in this case. Finally, the same lack of environmental significance which exempts such actions from NEPA supports a SEPA exemption under RCW 43.21C.110 allowing an exemption for actions which "are not major actions significantly affecting the quality of the environment."

The significance of a statutory exemption has been explained as follows:

> By virtue of their source, statutory exemptions are limited only by their own terms and conceivably, the constitutional equal protection requirement. Unlike administrative categorical exemptions, which are subject to the general qualifications that they may not include "major actions significantly affecting the quality of the environment", statutory exemptions immunize the specified

activities from SEPA requiremens regardless of their environmental significance. Settle, The Washington State Environmental Policy Act, §12, 78-78-1.

We conclude that, as a matter of law, the statutory exemption of CWA sec. 511(c)(1) establishes that the Ecology exemption of waste discharge permits at WAC 197-11-855 is reasonably consistent with SEPA.[3]

Lastly, the SEPA exemption of WAC 197-11-855 is self-executing. By its terms, the rule exempts from SEPA only those waste discharge permits that contain conditions "no less stringent than federal effluent limitations and state rules and regulations." Whether these permits meet federal and state law involves disputed facts which must be resolved at trial. If, however, the permits comply with federal and state law, the SEPA exemption applies. On the other hand, if the permits do not so comply, our recourse would be to remand the permits to Ecology for reissuance in a form which does comply with federal and state law. The SEPA exemption would then be appropriate. We will not remand, for SEPA analysis, permits which do not comply with federal and state law.

In summary, the SEPA exemption for waste discharge permits at WAC 197-11-855 is reasonably consistent with SEPA as a matter of law. It is also self-executing in that it applies

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[3] To underscore our conclusion, we take notice of the final decision of the Forest Practices Appeals Board in Snohomish County v Natural Resources, FPAB No 89-12 (1989). That case, arising at Lake Roesiger in Snohomish County was a sequel to Noel v Cole, supra, in that it reviewed the SEPA exemption for forest practices considered in Noel, which the State Department of Natural Resources had continued to apply despite the language of Noel. Like the SEPA exemption here, the forest practices exemption was adopted as a rule by Ecology The statutory authority cited in support of that exemption divided forest practices into those which do or do not have a potential for a substantial impact on the environment. RCW 43.21C 037 and RCW 76.09.050(1). The broad exemption rule was held inconsistent with those statutes as it encompassed practices with a potential for a substantial impact as well as those without such potential. Here, by contrast, the statutory authority of sec. 511(c)(1) proclaims all NPDES permits for existing sources to be without significant environmental effect. As noted by Professor Settle, statutory exemptions are limited only by their own terms While forest practices may or may not be exempt under RCW 43.21C.037 and RCW 76.09.050(1), waste discharge permits are exempted outright by sec. 511(c)(1).

to permits complying with federal and state laws, which will be the end result. Summary judgment is granted for the mills and Ecology on all SEPA claims.

WHEREFORE IT IS ORDERED:

1. Summary judgment is granted for the mills that in the absence of a dioxin numeric water quality standard promulgated under CWA Section 303(c)(2)(B), Ecology had no basis to issue the mills' dioxin control programs under CWA Section 304(l). The relief requested by the mills, namely striking the dioxin control programs from each permit, will not be granted, at this time. Ecology shall be afforded the opportunity to present other grounds, if any, in support of the dioxin control programs.

2. Summary judgment is granted to Ecology that its CWA Section 304(l) decisions are not premature in the absence of best available technology standards for dioxin.

3. Summary judgment is granted to Ecology that the data determining the amount of dioxin discharged by the mills was legally sufficient in the first instance, to list the mills under CWA Section 304(l).

4. Summary judgment is denied on Ecology's motion concerning dioxin limits on Columbia River mills.

5. Summary judgment is granted for the mills and Ecology on all SEPA claims.

DONE at Lacey, WA, this 15th day of May, 1992.

POLLUTION CONTROL HEARINGS BOARD

HAROLD S. ZIMMERMAN, Chairman

See Dissent in Part
JUDITH A. BENDOR, Member

ANNETTE S. McGEE, Member

WILLIAM A. HARRISON
Administrative Appeals Judge

lit.

0155J

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

JAMES RIVER, II, et. al., Appellants, v. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, et. al., Respondents.	PCHB Nos. 91-140, et. al. SEPARATE OPINION DISSENTING IN PART

I

I concur with the Board's Order granting the Department of Ecology's and the Mills' Motions for Summary Judgment on the State Environmental Policy Act.

II

The remaining motions present legal issues of first impression on portions of the federal Clean Water Act, 33 U.S.C. 1251 et. seq., as amended. (Hereafter referred to as the CWA.)1/

The State of Washington Department of Ecology has been delegated the authority by the U.S. Environmental Protection Agency ("EPA") to issue NPDES permits to existing sources. The State has adopted

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1/ For convenience, this opinion will use the public law form of citation to the CWA, as did the parties. Cross references to the codified law include: Section 303 of the CWA is 33 U.S.C. 1303; section 304 is 33 U.S.C. 1314; section 306 is U.S.C. 1316; section 307 is 33 U.S.C. 1317, and so forth.

statutes and regulations accordingly. Under State law, appeals of such permits are to this Pollution Control Hearings Board. Therefore this Board has authority to address applicable federal law.

III

Mill's Motion for Partial Summary Judgment on Dioxon Control Programs Based on 304(l)(1)

Legal Issue:

When navigable waters have been listed as water quality impaired under CWA Sec. 304(l)(1)(B) for dioxin, (i.e. 2,3,7,8 -TCDD; tetrachlorodibenzo-para-dioxin), and point dischargers to those waters have been listed under Sec. 304(l)(1)(C) as sources believed to impair the water quality: what is the "applicable water quality standard" under Sec. 304(l)(l)(D) for the point source dischargers' Individual Control Strategies to "achieve"?

This opinion dissents from portions of the Board's decision on this Motion. Under CWA Sec. 304(l)(1), a point source can be required to have an Individual Control Strategy (ICS) for toxic pollutant dioxin based upon a narrative water quality standard. A numeric water quality standard need not first be promulgated. Summary Judgment should be GRANTED to Ecology. Moreover, there are other lawful bases for the controls, such as under Section 303 of the CWA. See Decision at II. B., pages 7-8.

Background:

The federal Clean Water Act was first enacted in 1948, with major changes in 1972 (Pub. L. 92-500). Under the 1972 law:

> Limits on [point] discharges [into navigable waters] were to be effectuated by a system of permits, the National Pollution Discharge Elimination System

(NPDES). Without a permit, no person could "discharge ... any pollutant." CWA Sec. 301(a), [...]. National Resources Defense Council v. United States Environmental Protection Agency, 915 F.2d 1314, 1316 (9th Cir., 1990).

Although the major innovation of the 1972 amendments was to have technology-based NPDES permits:

> Congress maintained the concept of water quality standards both as a mechanism to establish goals for the Nations' waters and as a regulatory requirement when standardized technological controls for sources were inadequate. In recent years these so-called water quality based controls have received new emphasis by Congress and EPA in the continuing quest to enhance and maintain water quality to protect public health and welfare.
> 56 Fed. Reg. 58420, 58421 (November 19, 1991).

Under the CWA, the states had to designate uses for navigable waters, which are to be reviewed at least every three years beginning from 1972. NRDC, supra, at 1317, citing Sec. 303(c)(1). During this triennial review, the states are also to determine the water quality criteria for the water segments, i.e.:

> the maximum concentrations of pollutants that could occur without jeopardizing the [designated] use. These criteria could be either numerical (e.g. 5 milligrams per liter) or narrative (e.g. no toxics in toxic amounts).
> NRDC, supra, at 1317; emphasis added.

These water quality criteria, both narrative and numeric, are commonly referred to as water quality standards. Any NPDES permit issued has to demonstrate compliance with extant technology based standards and any applicable water quality standards.

Washington adopted a narrative standard for toxics, and has interpreted this standard for dioxin to be .013 ppq (picograms per liter), based on the Federal Water Quality Guidance (Gold Book 1986). Appellants challenge the validity of this water quality standard for dioxin, which is to be litigated in the hearing on the merits before this Board.

1987 CWA Amendments:

In 1987 the Clean Water Act was amended. Congress, well aware of the three-year cycle for water quality standards review, enacted CWA Section 304(l)(1), which in its very first sentence states:

> Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection--[...]. [Emphasis added.]

Subsection (1) then enumerates four provisions, A through D, each of which must be submitted to EPA within the two-year deadline.

> Section 304(1) did not change the basic requirements of the CWA; rather it simply established a mandatory schedule for the completion of a toxic pollutant subset of water-quality-related activities that the CWA already imposed. Thus, before 1987, Sec. 303(g) already had required states--without any deadline--to evaluate their waters and identify those which needed controls beyond technology-based controls. 33 U.S.C. Sect. 1313(d) [303(d)]. Section 301(b)(1)(C) already had required limitations in permits to meet water quality standards for all pollutants. 33 U.S.C. Sect. 1311(b)(1)(C).
>
> EPA has now promulgated final regulations interpreting and implementing Sec. 304(1). See 54 Federal Register 246-58 (Jan. 5, 1989) and 23,868-99 (June 2, 1989) (to be codified at 40 CFR Secs. 130.10, 123.46).

Westvaco Corp. v. EPA, 899 F.2d 1382, 1385 (4th Cir., 1990); emphasis added.[2/]

In 1987 Congress also enacted CWA 303(c)(2)(B). That section:

> did not change the existing procedural or timing provisions.
> 56 Fed. Reg., supra, at 58424.

The statute did require the states adopt numeric criteria for toxic pollutants within the three-year cycle. Id. In doing so, Congress did not accelerate the triennial water quality review time frame under the CWA. Id. The States were to adopt numeric water quality criteria for toxic pollutants by February 1990. This deadline was later extended to September 30, 1990, in the "interests of fairness". EPA acknowledged how difficult the water quality numeric review process had been for the States. 56 Fed. Reg., supra, at 58426.

In order to correctly implement the Clean Water Act, an understanding of these different deadlines is essential. Unfortunately the majority decision gives insufficient heed to Congress' choice of different time frames, thereby harming the statutory framework, and interposing possible delay where Congress did not so provide.

[2/] The U.S. Court of Appeals for the Ninth Circuit held in NRDC v. EPA, supra, that 40 CFR 140.10(d)(3) was too limited.

We now turn to the 304(l)(1) requirements:

> Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection--
> (A) a list of those waters within the State which after the application of effluent limitations required under section 1311(b)(2) of this title cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 1313(c)(2)(B) of this title, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balance population of shellfish, fish and wildlife, and allow recreational activities in and on the water.
> (B) a list of all navigable waters in such State for which the State does not expect the applicable standard under Section 1313 [Sect. 303, water quality standards] of this title will be achieved after the requirements of sections 1311(b) [Sect. 301b, effluent limitations], 1316 [Sect. 306, new sources], and 1317(b) [Sect. 307, pre-treatment] of this title are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 1317(a) of this title;
> (C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each toxic pollutant discharged by each such source; and
> (D) for each segment an individual control strategy which the State determines will produce a reducton in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 1342 [Sec. 402] of this title and water quality standards under section 1313(c)(2)(B) [Sec. 303(c)(2)(B)] of this title, which reduction is sufficient, in combination with exisitng controls on point and non-point sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy. [Emphasis added.]

The U.S. EPA, as the federal agency with key authority and responsibility for the CWA, is required to promulgate regulations applicable throughout the nation. The agency's interpretation of the federal CWA is entitled to great deference. See, EPA v. National Crushed Stone Association, 449 U.S. 64, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980).

In interpreting what is required in the Section 304(l)(1)(A)-(C) lists, EPA states:

> The section 304(l) statutory language mandates that states and EPA move forward expeditiously to achieve water quality goals and it does not provide relief from deadlines due to lack of numeric criteria within state water quality standards.
> 54 Federal Register 23868, 23880-81 (June 2, 1989); emphasis added.

Concurrently with this interpretation, EPA adopted regulations, including 40 CFR 130.10(d)(4), which state in part regarding the B list:

> [...] Where a state numeric criterion for a priority pollutant is not promulgated as part of a state water quality standard, for the purposes of listing water "applicable standard" means the state narrative water quality criterion to control a priority pollutant (e.g. no toxics in toxic amounts) [...].

Clearly EPA's interpretation is a permissible one, sufficiently rational to preclude substitution of judgment. See, Chemical Manufacturer's Association v. NRDC, 470 U.S. 125, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985).

The Ninth Circuit held, in NRDC, supra, 915 F.2d, at 1319, fn 5, that the B list includes waters where any water quality standards are believed to be impaired, including the water quality standards extant before 1987. In Washington, this includes narrative water quality standards.

In brief, Ecology listed in B those waters believed to be impaired for the toxic pollutant dioxin. Ecology listed the mills on the C list as point sources believed to be preventing or impairing the waters. The Board unanimously concludes that Ecology had sufficient information to list the mills.

Under the CWA Sec. 304(l)(1)(D), Washington was also required to submit to EPA by February 4, 1989, within the same two years, Individual Control Strategies (ICSs) for the waters listed, showing effluent limitations:

> which will result in achievement of the applicable water quality standard as soon as possible, but in no event later than 3 years after establishment of the strategy [...].
> 54 Fed. Reg. 246, 252 (January 4, 1989).

The regulations for 304(l)(1)(D) are at 40 CFR 123.46. The ICSs are to be in the form of draft or final NPDES permits and must show attainment of the "applicable water quality standard within three years after the date of the establishment of such strategy." 40 CFR 123.46(a).

In the CWA, both Sections. 304(l)(1)(B) and (D) use the phrase

"applicable standard", as does the regulation. The phrase means those water quality standards lawfully required to be in effect by the date when the lists are due, e. g. February 1989.

This opinion renders no words superfluous. If numeric standards do exist, then are they required to be applied.

There is not even a whisper of a suggestion in the Federal Register notices adopting regulations for CWA 304(l)(1) or 303(c)(2)(B) that ICSs must be based on numeric water quality standards. The absence of such regulatory requirement is both rational and permissible. See, Chemical Manufacturers Ass'n v. NRDC, supra.

Congressional intent and the basis statutory framework are not altered by the passage of time. Nor is the principle of mootness applicable when determining the meaning of a statute.

My colleagues' decision is in error. To require there first to be a numeric water quality criteria contravenes the different deadlines in the Act, i.e. the two year deadline (February 4, 1989) for paragraph 304(l)(1) submissions, including the ICSs, whereas under 303(c)(2)(B) numeric water quality standards are on a three year cycle, with the deadline extended to September 30, 1990. Under my colleagues' theory, nationwide the states would either be required to

accelerate the numeric standards adoption process,[3] or delay issuance of the ICSs to accommodate the triennial water quality review cycle. Yet the U.S. Court of Appeals has made clear that section 304(l)(1) does not, in any manner, provide legal authority for requiring the acceleration of the water quality revision cycle or the adoption of numeric standards. See, Westvaco, supra.

The requiring of numeric standards also contravenes interlocking aspects of the paragraphs in 304(l)(1). In 304(l)(1) there are ICSs under D for all point sources for waters listed in A or B which are believed to be preventing or impairing applicable water quality. The majority decision impermissibly creates a discontinuity and disjuncture between the sections.

My colleagues also too narrowly focus on one phrase in 304(l)(1)(D). Some might view such approach as "parsed and dissected", revealing a "meticulous technicality" which is not to be applied to the Clean Water Act. See, EDF v. Costle, 657 F.2d 275, 292 (D.C. Cir., 1981), with citations.

The federal regulations governing NPDES permits issuance are consistent with this Board Member's opinion. Where appropriate,

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[3] The states' difficulty in adopting numeric standards in the three-year time frame is obvious. By February 1990 only six states had complied with the Sec. 303(c)(2)(B) requirements. 54 Fed. Reg., supra, at 58421. On November 19, 1991, EPA "to assist States in such circumstances" began the process to promulgate chemical-specific numeric criteria for priority toxic pollutants, numeric water quality standards, including for dioxin. Id. This promulgation is apparently in abeyance, due to a federal regulatory freeze.

NDPES permits are to have:

> any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to: (1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality. [...]
> 40 CFR 122.44(d)(1); emphasis added.

"[D]eference must be accorded to EPA's interpretation of the Clean Water Act." EDF v. Costle, supra, at 292. Even greater deference is accorded EPA's own regulation. Id., citing Udall v. Tallman, 380 U.S. 1, 16 , 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), and other cases.

There appears to be separate authority in the CWA under Sections 303 and 402 for the issuance of permits with dioxin controls based on the narrative standard.

The conclusions reached in this opinion are not inconsistent with ITT Rayonier v. Ecology, 91 Wn.2d 682 (1978). The 304(l)(1) lists and ICSs due in February 1989 present no delay chargeable to the government. Neither the states nor the EPA had a statutory duty to adopt numeric standards before the 304(l)(1) lists and ICSs were due. In the ITT case, in contrast, there were statutorily interdependent deadlines which the government failed to meet.

Ecology should be granted summary judgment on this motion.

IV

Ecology's Motion for Partial Summary Judgment on Dioxin Control Programs for Columbia River Mills

I concur in the result to not grant the Department of Ecology's Motion for Partial Summary Judgment. This concurrence is based solely on the discretion retained by Ecology after the EPA-adopted TMDL. See Decision at III, pages 13-14. Material facts remain in dispute.

I dissent from the remainder of my two colleagues' decision on this motion.

It is noted that this Board nonetheless retains jurisdiction to determine the merits of the State of Washington's water quality standard for dioxin, because mills not on the Columbia River are not encompassed by this motion.

Analysis:

The Columbia River has been identified as water quality limited for the toxic pollutant dioxin. At the request of the states, including Washington, EPA adopted a Total Maximum Daily Load (TMDL) for dioxin for the Columbia River Basin. While the states had the authority under the CWA in the first instance to do the TMDL, they relinquished that role to the federal government.

EPA determined the TMDL without relying on the Washington narrative water quality standard, as the folllowing quotation makes clear:

> As stated above, this TMDL has been developed to achieve attainment of the water quality standards of all affected states. Although the wording of the applicable state standards for Idaho, Oregon, and Washington differs, EPA has interpreted these standards as being equally stringent. Even if this is not the case, however, 2,3,7, 8-TCDD loading to upstream segments still must be restricted to levels ensuring the

attainment of water quality standards applying to downstream segments.1/ Where this document refers to "the standard" or "the criterion" for 2,3,7, 8-TCDD, thus means the 0.013 ppq criterion at the 10^6 risk level and, by implication, the assumptions which form the basis of that criterion as established by EPA. That criterion, adopted by the State of Oregon, is the controlling water quality standard which this TMDL protects.

1/ The Superior Court of Washington for Thurston County recently found that the manner in which the State applied their water quality standards to the listing under 304(1) of three pulp and paper mills was invalid. EPA believes that this decision does not affect the use of 0.013 ppq as the water quality standard for dioxin in developing this TMDL because all waste load allocations and permit limits must ensure compliance with applicable water quality standards of downstream states ([40 CFR 122.4(d)]. Oregon's water quality standard is clearly stated as being 0.013 ppq for 2,3,7,8,-TCDD.
TMDL Decision Document, February 25, 1991, attached to Chung Ki Yee Affidavit at A-2.

No authority has been cited demonstrating this Board has any jurisdiction to adjudicate the EPA established TMDL for the Columbia River Basin. When EPA established a TMDL to limit discharges of dioxin to the Columbia River Basin, it adopted a plan of its "own devising". See, Roll Coater, Inc., v. Reilly, 932 Fd.2d 668, 670 (7th Cir., 1991). EPA did not merely approve the work of others. Therefore, jurisdiction is properly and exclusively with the U.S. Court of Appeals. See, Id. In so concluding, it need not be determined whether the mills have chosen to exercise their right to jurisdiction in the federal courts, as that inquiry is not material to

a jurisdictional determination. This Board has no jurisdiction to litigate the TMDL or the EPA-adopted Waste Load Allocations.

Yet my colleagues would explicitly contravene this jurisdictional limitation, when they state this State Board has jurisdiction to factually determine whether Washington mills dioxin limits are necessary to attain Oregon water quality standards. Decision at page 13. That decision has already been made, and jurisdiction, if any, resides in the federal court system. Nor has any authority has been cited that the Board has pendent jurisdiction over this matter. Additionally, given EPA's actions, there remains no factual issue for this Board to adjudicate on the relationship of these Columbia River mills' discharges to the Washington water quality standards. In its actions, EPA relied on the Oregon water quality standard.

If the split in venue for the issues appears to be inefficient, it is a situation this State Board is without power to change. For this Board, with its limited jurisdiction, is the recipient of the parties' litigation, a forum for adjudicating those disputes presented to it when jurisdiction and relevance exist. When the states ceded their role to the federal government, that action determined where respective jurisdiction on appeal would reside.

Summary Judgment in Part should be GRANTED to Ecology on this Motion. The Clean Water Act, principles of limited jurisdiction, judicial restraint, and relevance compel this result.

SEPARATE OPINION DISSENTING IN PART

I. State Environmental Policy Act Issue.

The Board is unanimous in GRANTING Summary Judgment to the Department of Ecology and the Mills.

II. Mills' Motion for Summary Judgment regarding Section 304(l) of the Federal Clean Water Act:

A. Summary Judgment should be GRANTED to Ecology. The State of Washington Department of Ecology had a lawful basis to issue the Individual Control Strategies containing dioxin control programs based upon narrative water quality standards. Numeric water quality standards are not required.

B. The Board is unanimous that:

1. Ecology can assert alternative grounds for its action;

2. GRANTING Summary Judgment to Ecology on Section 304(l) regarding Best Available Technology and on the legal sufficiency of the evidence.

III. Department of Ecology's Motion for Summary Judgment regarding the Columbia River Mills Dioxin Programs:

A. The Board is unanimous that Summary Judgment should be DENIED to Ecology on the basis that <u>after</u> EPA issued the TMDL, Ecology retained some discretion to determine the actual dioxin effluent limits. There remain contested material facts to adjudicate.

B. In all other respects, Summary Judgment should be GRANTED to Ecology. This opinion therefore dissents from the remainder of the Board's decision on this motion.

DONE this 15th day of May, 1992 in Lacey, Washington.

JUDITH A. BENDOR
Attorney Member